In Rebuff to Labor Board, Fifth Circuit Sustains Arbitration Agreements with Class Action Waivers

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BY: DAVID C. BURTON, BETH HIRSCH BERMAN AND J. NELSON WILKINSON

In recent years, employers have faced increased, and increasingly expensive, class action litigation from current and former employees. In response, many employers have turned to arbitration agreements with class-action waivers as a preemptive defense to such lawsuits.

As most readers will recall, however, in 2012 the National Labor Relations Board issued a holding attacking such agreements. In the case of *D.R. Horton*, the Board held that a national homebuilder?s arbitration agreement prohibiting class or collective arbitrations violated the National Labor Relations Act because it violated the rights of employees under Section 7 to engage in ?protected or concerted activity.? This holding seemed to many to contradict twenty years of Supreme Court rulings repeatedly upholding arbitration agreements in the employment context. Accordingly, upon the issuance of the Board?s decision, the business community grew concerned at what it perceived to be an overreach by the National Labor Relations Board, and an attempt to insert itself into the non-unionized workplace where the majority of the employment arbitration agreements exist.

On December 3, 2013, the Fifth Circuit overturned the Board. It held 2 to 1 that the National Labor Relations Board erred in finding that such agreements and their prohibitions against class or collective proceedings, whether as arbitration or judicial proceedings, violated the National Labor Relations Act. In a detailed analysis, the Fifth Circuit reviewed the goals and history of the National Labor Relations Act and the Federal Arbitration Act (a statute generally approving and permitting arbitration agreements). Rebuffing the Board?s argument that the National Labor Relations Act preempted the Federal Arbitration Act, the Fifth Circuit held that the two statutes are of equal importance. The Fifth Circuit found there was no legislative history to support the NLRB?s view that the National Labor Relations Act contained a congressional command to override the Federal Arbitration Act.

The Court went on to hold that the right to participate in collective and class action lawsuits was not substantive but procedural, and that the National Labor Relations Act?s ?concerted activity? language

protected only substantive rights.

As a result, the arbitration agreement that D.R. Horton had between its employees and the company did not violate Section 7 of the National Labor Relations Act, even though it contained a prohibition against class and collective action arbitrations. In so holding, the Fifth Circuit joined the Second, Eighth and Ninth Circuits which earlier this year had found arbitration agreements containing class waivers to be enforceable. No circuit court has held otherwise.

The Fifth Circuit however did side with the National Labor Relations Board in determining that the provisions of D.R. Horton?s arbitration agreement that forbid employees from filing unfair labor practice charges with the NLRB violated Section 8(a)(1) of the National Labor Relations Act. According to the decision, D.R. Horton must revise its arbitration agreement to make it clear that employees retain a right to file charges with the National Labor Relations Board. Such a finding potentially opens the door for the National Labor Relations Board to pursue collective or class actions on behalf of employees, even where those employees signed arbitration waivers that would otherwise prohibit them from pursuing such coordinated claims. One suspects that the next battleground with the National Labor Relations Board will be this very issue. Employers of course will argue that, if arbitration agreements are in play, just as in the case of collective bargaining agreement arbitration procedures, that the National Labor Relations Board should defer its prosecution of any unfair labor practice claims to the arbitration procedure.

As the law evolves in this area, employers will need to continue to review their policies. Arbitration agreements containing class waivers may be appropriate for those employers that wish to avoid the threat of class and/or collective actions. However, as the decision in *D.R. Horton* underscores, the enforceability of waivers may turn on the particular wording of those agreements and whether they contain the appropriate carve-outs. Employers need to be careful to craft arbitration agreements that are not discriminatory and do not mislead employees as to which rights they are waiving. In addition, employees should receive a complete copy of the agreement into which they are entering and should be fully informed as to those rights that they are giving up by entering into such agreements.

Related People

- David C. Burton ? 757.473.5354 ? dburton@williamsmullen.com

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